IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No. 73 of 1995

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA
HONOURABLE MS.JUSTICE H.N.DEVANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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COMMISSIONER OF INCOME TAX - Applicant(s)

Versus

PREM CONDUCTORS PVT LTD - Respondent(s)

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Appearance :
MR BB NAIK for Applicant
NOTICE SERVED for Respondent(s) : 1,
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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA
and
HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 24/11/2005

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE D.A.MEHTA)

1.The Income Tax Appellate Tribunal, Ahmedabad Bench “C” has referred the following question under Section 256(1) of the Income Tax Act, 1961 (the Act) at the instance of the Commissioner of Income Tax.

> “Whether the Appellate Tribunal is right in law and on facts in cancelling the re-assessment order u/s 143(3) r.w. Section 147(a), when the assessee had received the excise duty refund the benefit of which was not passed on to its customers and this fact came to the knowledge of the Assessing Officer subsequently?”

2.The assessment year 1978-79 and calender year 1977 is the relevant accounting period. On 30/6/1978, the return of income declaring loss of Rs.1,89,314/- was filed. The assessing officer passed an order under section 143(3) of

the Act on 8/1/1981.

3.It is the case of revenue that subsequently it came to light that assessee company had received refund of Rs.5,89,000/- from the Central Excise Department. Therefore, the assessment was re-opened under section 147(a) of the Act by issuing notice under section 148 of the Act on 16/2/1984. The assessing officer ultimately taxed the said amount as income under section 28(iv) of the Act.

4.The assessee carried the matter in appeal before the Commissioner (Appeals), who came to the conclusion that, since all the primary facts were fully disclosed at the stage of original assessment and the assessing officer had completed the original assessment after due application of mind, the action of the assessing officer to re-open the assessment was based on mere change of opinion on same set of

facts. He, therefore, cancelled the re-assessment order. This order of Commissioner (Appeals) has been confirmed by the Tribunal by dismissing the departmental appeal. The Tribunal has also noted that the assessee had filed all material facts relating to excise duty refund along with the return; the assessing officer examined the question of liability of excise duty refund during the course of original assessment; and after considering the explanation given, did not tax the said excise duty refund. The Tribunal, therefore, held that there was no omission or failure on part of the assessee to disclose fully and truly all material facts relating to excise duty refund and the re-assessment proceedings were without jurisdiction.

5.Mr.Naik, the learned standing counsel appearing on behalf of the applicant, submitted that, subsequently it had come to the notice of the

assessing authority that the assessee had not returned the amounts to its customers and hence, it amounted to furnishing inaccurate particulars. He, therefore, urged that both the Commissioner (Appeals) and the Tribunal had committed error in law in cancelling the re-assessment.

6. Though served, there is no appearance on behalf of the respondent assessee.

7. As can be seen from the assessment order, the assessment has been re-opened by the assessing officer by recording that it had come to light subsequently that the assessee company had received refund of Rs.5,19,000/- from Central Excise Department. It is nowhere stated that assessment is re-opened for any omission or failure on part of the assessee. In the entire re-assessment order, the thrust is on holding that such refund amounts to trading receipt and

the contention of the assessee that the same is not taxable is rejected. Finally, the amount is brought to tax u/s 28(iv) of the Act. The said provision talks of value of any benefit or perquisite, whether convertible into money or not, arising from business, and the same is chargeable to income tax under the head “profits and gains of business or profession”.

8. In the circumstances, it is apparent that the entire re-assessment proceeding is based on mere change of opinion as to taxability of the item and no failure or omission is ascribed to the assessee. The re-assessment proceedings having been initiated beyond a period of four years from the date of the end of the assessment year in question, the Commissioner (Appeals) and the Tribunal were justified in holding that the onus is on revenue to show that there was a failure or omission on part of the assessee to disclose all material facts.

Nothing has been brought on record to displace the concurrent findings of fact recorded by both the appellate authorities that there was no omission or failure on part of the assessee; that the assessee had disclosed fully and truly all material facts relevant for the assessment for assessment year in question.

9.In the circumstances, the question referred is answered in the affirmative i.e. in favour of the assessee and against the revenue. The Tribunal had rightly cancelled the re-assessment proceedings.

10.The Reference stands disposed of accordingly. There shall be no order as to costs.

[D.A.MEHTA, J.]

[HARSHA DEVANI, J.]

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